Case No._____

IN THE SUPREME COURT
OF THE STATE OF MONTANA

CHRISTINE R. BARSTAD, M.D.,

Petitioner,

-vs-

MONTANA FOURTH JUDICIAL DISTRICT COURT,
Missoula County, Cause No. DV:06-89,
the Honorable Douglas G. Harkin, Presiding Judge.

Respondent.

APPLICATION FOR WRIT OF SUPERVISORY CONTROL

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PETITION

The above named Petitioner, respectfully applies for a writ of supervisory control pursuant to Rule 14, M.R.App.P. to correct a mistake of law and to remedy a gross injustice in Cause No: DV-06-89 filed in the Fourth Judicial District Court, Missoula County. Petitioner seeks the following relief: 1) that discovery in this case be allowed to proceed, which discovery has been stayed and denied Petitioner since the District's Order entered on August 18, 2009; 2) that a discovery master who is neither necessary to this case nor which Petitioner can afford but which was nevertheless ordered by the District Court on July 16, 2010 not be appointed; and 3) that a scheduling order be set in this case which scheduling order the District Court has denied in spite of repeated requests by Petitioner. See Exhibits A, B, C, and D.

FACTS SUPPORTING PETITION

Petitioner Barstad personally served each of the four Defendants in this action on May 7, 2007. On that same date, each of the Defendants was also served with Plaintiff's initial set of discovery requests. Petitioner Barstad stipulated to a protective order which Defendants prepared with full knowledge of the requested discovery which had previously been served. The protective order was signed by the District Court in September of 2007 to maintain the confidentiality of

numerous documents produced by the parties and limiting their use to this specific action. [Exhibit E].

Notwithstanding the fact that a protective order was already in place, Defendants failed to produce certain documents in response to the served discovery on the grounds that the same were "confidential". Moreover, many of the documents that were produced were heavily redacted. After numerous letters and phone calls initiated by counsel for Petitioner failed to resolve the issue, Petitioner was forced to file a motion to compel in April of 2008 to obtain discovery necessary to her case. In response, Defendants filed motions requesting another protective order. The District Court entertained extensive briefing regarding the discovery dispute which briefing was complete in June of 2008. On September 30, 2008, the District Court entered its Order reserving ruling on both Petitioner's motion to compel and Defendants' motions for protective order requesting additional briefing. The additional briefing requested by the District Court was completed in January of 2009.

Still awaiting complete responses to the discovery she served in May of 2007, Petitioner submitted additional discovery requests to Defendants in October of 2008. Defendants' complete non-responsiveness to the second set of discovery requests resulted in Petitioner having to file a second motion to compel in March of 2009, followed by yet another motion for protective order by Defendants. The briefing on

these motions was completed in May of 2009.

In late February of 2009 Defendants filed a motion to stay any additional discovery pending resolution of the discovery issues then pending. Petitioner opposed any stay, but the District Court nevertheless ordered a ban on any further discovery in this action on August 18, 2009 holding that to best save "the resources of the parties and this Court. . .IT IS HEREBY ORDERED that additional discovery in this case is STAYED" until such time as the discovery issues were resolved. [Exhibit A]. As a result of the District Court's August 18, 2009 Order, Petitioner's case has come to a complete standstill.

On February 1, 2010, Petitioner filed a request for scheduling conference. [Exhibit C]. Petitioner renewed her request for a scheduling conference on March 2, 2010. [Exhibit D]. On March 9, 2010 the District Court issued an Order stating that because "this Court hired a new clerk several weeks ago, it is necessary to allow additional time for the new law clerk to become familiar with the case."

On March 16, 2010 the Court ordered the parties to supplement their previously filed discovery briefs and respond with additional information to specific questions. The additional information was provided and completed by April 16, 2010. On June 3, 2010 the District Court entered its Order on certain of the discovery requests at issue. For the most part, Petitioner prevailed and Defendants

were instructed to provide additional information which had previously been withheld. Petitioner had requested an award of her legal fees and expenses in her motion to compel. The District Court did not address the issue of the legal fees and expenses.

On June 11, 2010 however, the District Court entered its Order suggesting that it was considering the appointment of a special master to address the remaining discovery issues which discovery master would be paid "equally by the Plaintiff and the Defendants" and requesting the parties to advise the Court if they have any objection to such an appointment.

Petitioner objected to the appointment of a discovery master on a number of grounds and advised the District Court that "given the significant discovery ordered to be produced by Defendants in the Court's earlier June 3, 2010 order and the additional delay and significant expense which will be occasioned by the appointment of a discovery master, neither of which Plaintiff Barstad can afford, Plaintiff believes that if Defendants are ordered to timely produce those documents set forth in the June 3, 2010 Order and the August 18, 2009 discovery ban is lifted to allow Barstad to serve specific and detailed additional discovery necessary to her case, no discovery master is necessary and the case may proceed 'as is'". [Exhibit F].

As an alternative solution, in her response and objection, Petitioner Barstad

had suggested that:

> If the Court decides a discovery master is necessary, Plaintiff Barstad requests either that she be awarded her legal fees and expenses as the prevailing party on her motion to compel to provide her with necessary funds with which to pay the discovery master or, in the alternative, that a retired judge having retired under the provisions of the Montana Judges' Retirement System be requested to act as the discovery master pursuant to M.C.A. §19-5-103 so that the salary may be paid by the State of Montana. Plaintiff Barstad would suggest retired District Judge John S. Henson as a possible person to serve as the discovery master if this Court deems it necessary to do so.

[Exhibit F].

Retired Judge Henson had been contacted by Petitioner's counsel before suggesting his name to the District Court. Judge Henson was willing to serve as the discovery master.

Notwithstanding Petitioner's objections or her suggestion, on July 16, 2010 the District Court ordered that it will appoint a discovery master for which Petitioner will be obligated to pay 50% of the expense even though there are a total of five parties involved in this action. [Exhibit B].

To date, the District Court has not established any scheduling order.

LEGAL ARGUMENT

Under Article 7, section 2, of the Montana Constitution, the Montana Supreme Court has original jurisdiction to issue, hear, and determine writs. *State ex re. Eccleston v. Dist. Ct.*, 240 Mont. 44, 47, 783 P.2d 363 (1989). The issuance of a writ

of supervisory control may be justified by circumstances of an emergency nature such as when due appeal to the Montana Supreme Court is an inadequate remedy. Mont. R. App. P. 17(a). See, *State ex re. Fitzgerald v. Dist. Ct.*, 217 Mont. 106, 114 703 P. 2d 148 (1985).

The issuance of writ of supervisory control is proper "to control the course of litigation when the lower court has made a mistake of law or wilfully disregarded the law so that a gross injustice is done and there is no adequate legal remedy by appeal." *State ex. Rel. U.S.F. & G. v. Dist. Ct.*, 240 Mont. 5, 8, 783 P.2d 911 (1990). This Court's exercise of supervisory control is also appropriate for purpose of clarifying the law and in the interests of judicial economy. *Eccleston*, 240 Mont. at 48.

In the present action, Petitioner is being denied her right to conduct discovery and her right to a "speedy, and inexpensive determination" of her case. "The purpose of the Montana Rules of Civil Procedure is to 'secure the just, speedy, and inexpensive determination of every action.' Rule 1, M.R.Civ.P. . . Achieving a just determination is **contingent upon full disclosure**. As we have stated, 'mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation.' *State Highway Comm'n v. District Court* (1966), 147 Mont. 348, 357, 412 P.2d 832, 837. Achieving a speedy and inexpensive determination is **contingent upon timely disclosure**, which is thwarted by protracted legal wrangling over

semantic nuances and technicalities." *Richardson v. State of Montana*, 2006 MT 43 ¶63, 331 Mont. 231 ¶63, 130 P.3d 634 ¶63.

The normal appeal process is inadequate under the facts of this case.

A. Denial of the Right to Conduct Discovery.

Defendants filed motions to stay discovery after Petitioner was forced to file a second motion to compel in response to Defendants' complete failure to respond to any of her second set of discovery requests.

Opposing Defendants' motions to stay, Petitioner cited the District Court to the Montana Supreme Court's decision in *Burlington Northern v. District Court*, (1989) 239 Mont. 207, 779 P.2d 885 in which this Court addressed a somewhat similar factual circumstance to that presented to the District Court through Defendants' motion to stay additional discovery and Petitioner's second motion to compel. *Burlington* also involved a case brought to the attention of the Supreme Court via a writ of supervisory control. In the underlying action there was a dispute involving discovery of potentially privileged material. The district court granted the plaintiff's motion to compel and ordered disclosure of the requested material and also entered a partial protective order compelling Burlington to disclose certain employee earnings, but keeping the employee identities confidential. The district court also restrained the defendant from pursuing any further discovery until ten days after it had complied

with plaintiff's discovery requests. The district court awarded the plaintiff his legal fees and expenses in bringing the motion to compel.

Addressing the issue of whether or not the district court erred in enjoining the defendant from any other discovery until it had complied with the court's discovery order, this Court discussed this issue and held as follows:

> Defendant urges that this injunction against discovery is both inappropriate and overly severe. . . Rule 37, M.R.Civ.P. authorizes sanctions for discovery abuses. . . Rule 37, M.R.Civ.P. is divided into four subsections. The distinctions between each section must be recognized in analyzing the facts of the present case. Rule 37(a) provides that a party may apply for an order compelling discovery. If the motion is granted, the court shall award attorney fees and costs to the moving party, "unless the opposition to the motion was substantially justified." This same rule applies to the party opposing the motion if the motion is denied. Rule 37(a)(4).
>
> Rule 37(b) provides for sanctions for failure to comply with an order. It is not necessary that the failure be willful. It appears that a finding of willfullness is relevant only to the choice of sanction. [citation omitted] In conjunction, Rules 37(a) and (b) contemplate giving the party a second chance to comply with discovery requests before awarding sanctions.
>
> Rule 37(d) authorizes sanction for 3 specific failures: 1) failure to attend at one's own deposition, 2) **failure to serve answers to interrogatories**; or 3) **failure to serve a written response to a request for production.** In the event of one of these failures, a court may issue sanctions without first ordering the non-responding party to comply. No second chance is contemplated. It is important to note this distinction between Rule 37(b) and Rule 37(d). Under section (b) no sanctions are available without a previous court order; under section (d) no order is necessary, however, sanctions are only authorized for the three enumerated failures.
> * * * *
> In the present case defendant argues that sanctions were not appropriate

> pursuant to Rule 37(b) because the defendant had not failed to comply with an order. We agree with defendant's contention. We further conclude that Rule 37(d) does not authorize sanctions in the present case because defendant did not violate one of the express instances in which it may apply. Therefore, there was no provision within Rule 37 authorizing the sanction imposed in the present case.
> * * * *
> The portion of the District Court's order which enjoined defendant from any further discovery until ten days after compliance with the order is therefore vacated.

Id. at 892-895. [Emphasis supplied.] This Court affirmed the district court's award of legal fees and costs to plaintiff in the *Burlington Northern* case in the amount of $7420.

In the present Barstad action, by virtue of Defendants "failure to serve answers to interrogatories" and "failure to serve a written response to a request for production" to Petitioner Barstad's second discovery requests, Defendants should have been subjected to sanctions under Rule 37(d) M.R.Civ.P. Instead, however, the District Court has unjustly sanctioned Petitioner by staying all discovery in her case for an indeterminate period of time.

Petitioner has neither violated any discovery order, nor failed to serve answers to interrogatories nor failed to serve written responses to requests for production. There is absolutely no basis in the rules of civil procedure for the sanctions which the District Court imposed upon the Petitioner, yet she has been denied the ability to

conduct any discovery in her case for nearly a full year and continuing. This Court determined in *Burlington* that a 10 day delay in the ability to conduct discovery was a "severe sanction." *Id.* a 894. Petitioner has been denied the right to conduct discovery for a year and counting with no relief in sight.

B. Sanction Requiring Payment of a Discovery Master.

Petitioner has not engaged in any wrongdoing, yet she is additionally being sanctioned by the District Court by being required to pay for the services of an independent discovery master, which services she can ill afford.

So as not to require the appointment of a discovery master and cause further delay and expense in this case, Petitioner made it clear to the District Court that in the interests of moving this case forward she was willing to forego complete responses to the balance of the discovery she previously served if the ban on discovery were lifted, Defendants complied with the Court's June 3, 2010 discovery order and she was simply allowed to conduct further discovery under the protective order currently in place. [Exhibit F].

Unfortunately, the District Court refused that offer and further refused Petitioner's suggestion of calling in a retired District Judge under M.C.A. §19-5-103 so that the salary might be paid by the State of Montana.

A gross injustice will occur if the District Court is allowed to appoint a

discovery master for which Petitioner will be required to pay 50% of the expense. Under the current fact situation, this appointment does nothing to further the "just, speedy, and inexpensive determination" of this cause.

C. A Scheduling Order Must be Entered.

The Defendants in this action were served on May 7, 2007. Rule 16(b) M.R.Civ.P. states in pertinent part: "The [scheduling] order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint."

No scheduling order has ever been established in this action. Petitioner Barstad filed a Request for Scheduling Order on February 1, 2010 which she renewed on March 2, 2010. To date, no scheduling order has been issued. Petitioner is entitled to have a scheduling order in place to guide the parties to completion of this action.

CONCLUSION

This Court has the authority to accept jurisdiction and issue a writ of supervisory control to provide the relief requested and halt the gross injustice to Petitioner who has been denied the opportunity to conduct any discovery in her case for nearly a year and continuing, to prevent the injustice of Petitioner having to pay for a discovery master whom she can ill afford, and to require the District Court to implement a scheduling order. Petitioner has no other adequate or speedy remedy

available.

Respectfully submitted this 10th day of August, 2010.

ANTONIOLI and WADE, P.C.

By Stacey Weldele-Wade
Stacey Weldele-Wade

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that pursuant to the Montana Rules of Appellate Procedure, Rule 14(9)(b) and Rule 11, this Application for Writ of Supervisory Control is proportionately-spaced, roman text, of 14 points and is 2664 words.

Dated this 10th day of August, 2010.

ANTONIOLI AND WADE, P.C.

Stacey Weldele-Wade
Stacey Weldele-Wade

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 10th day of August, 2010 the foregoing document was served on the following by hand-delivery or by depositing a copy of the same in the U.S. Mail, postage prepaid thereon, addressed as follows, unless otherwise indicated below:

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